

diagnosis and symptoms. Claimant further argues the Board does not have jurisdiction to address the issue of temporary total disability compensation.

Issues for the Board's consideration are as follows: 1) whether claimant's alleged injury occurred out of and in the course of his employment with respondent; and, 2) whether claimant is entitled to temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Lorenz Goebel began working for Atchison Casting Corporation on October 26, 2004. Claimant was hired as a welder but is classified as a cleaner. His job duties included cleaning the casings, running a heavy grinder, jack hammers and chipping away the metal parts. The grinder weighed approximately 20-25 pounds and the jack hammer weighed approximately 40 pounds. Claimant testified he used the grinder every day as well as using the jack hammer about three to four hours a day. The respondent provided training in order for the claimant to become certified in welding.

After the claimant had worked approximately four weeks, he began to notice discomfort in his hands and arms as well as pain and numbness. The claimant would have tingling in his hands at work and then at night would have painful numbness. Claimant testified he called into work on either December 6 or 7, 2004, and left a message on the answering machine that he was ill and would not be in to work. He then sought medical treatment at the VA hospital. The claimant was diagnosed with bilateral carpal tunnel syndrome and prescribed anti-inflammatory medication.

The claimant returned to work on December 8, 2004 and told his supervisor that he had been diagnosed with carpal tunnel syndrome and that he did not think he could do his job. After some further discussions the claimant was referred to the company physician. Dr. W.D. Fretz confirmed the diagnosis of bilateral carpal tunnel syndrome and restricted claimant from intense wrist work. Claimant was told his restrictions could not be accommodated and that he should seek treatment at the VA hospital.

Because claimant had not called in on December 6 or 7, 2004, he was terminated effective December 8, 2004, and that is why he was not provided light duty according to Mark Schmucker, respondent's vice-president of human resources. Mr. Schmucker confirmed that claimant welded for only 67 hours during his six weeks employment with respondent but agreed that when not welding claimant would have been operating a grinder or the jackhammer.

Claimant's attorney referred him to Dr. George G. Fluter who diagnosed claimant with bilateral carpal tunnel syndrome and opined there was a causal relationship between

claimant's work activities with respondent and his condition.¹ Conversely, Dr. Fretz, the company physician, signed a letter signifying his agreement with the statements in a letter drafted by respondent's counsel which indicated the doctor did not believe claimant's work for respondent was a competent causing mechanism for claimant's symptoms.²

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.³ A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."⁴ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁵

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁶

The claimant testified that he began to experience pain, numbness and discomfort in his hands after working for respondent for approximately four weeks. His job required using his hands to weld, operate a grinder and a jackhammer. The claimant sought treatment and was told that he had bilateral carpal tunnel syndrome. When he told his employer of that diagnosis he was sent to the company physician who provided restrictions. Dr. Flutter confirmed the diagnosis of bilateral carpal tunnel syndrome and related the condition to claimant's work activities with respondent. The Board affirms the ALJ's determination the claimant met with personal injury by accident arising out of and in the course of his employment.

The respondent next argues the ALJ erred in awarding claimant temporary total disability benefits. But claimant argues the Board does not have jurisdiction to address that issue on appeal from a preliminary hearing. The Board agrees.

¹ P.H. Trans., Cl. Ex. 2 at 3.

² P.H. Trans., Resp. Ex. C.

³ K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁴ K.S.A. 44-501(a).

⁵ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁷ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁸

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁹

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Accordingly, the respondent's appeal of the ALJ's award of temporary total disability compensation is dismissed.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated March 18, 2005, is affirmed. The respondent's appeal of the award of temporary total disability compensation is dismissed.

IT IS SO ORDERED.

⁷ K.S.A. 44-551.

⁸ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Dated this 31st day of May 2005.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director